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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

CASE NO. 3:23-CR-00030-SI

Plaintiff,

GOVERNMENT'S MOTIONS IN LIMINE

V.

OLVIN ISAAC GUTIERREZ-NUNEZ, et al,

Defendants.

GOVERNMENT'S MOTIONS IN LIMINE

The United States submits the following motions *in limine*. The government requests the opportunity to supplement these motions *in limine* if additional legal issues arise requiring the Court's consideration. The government also requests leave to supplement these motions should the Defendant produce any reciprocal discovery under Federal Rule of Criminal Procedure 16(b) after the date of this motion.

BACKGROUND

A. Background on Nunez Investigation

In April 2022, an undercover officer from the San Francisco Police Department approached

1 Defendant Olvin Isaac Gutierrez Nunez, who was standing on the 700 block of Eddy Street in the
2 Tenderloin of San Francisco. The officer asked for \$100 worth of “yellow,” which is a street name for
3 fentanyl. Nunez produced a bag of fentanyl and exchanged the drugs for \$100 in cash. Nunez then
4 provided a phone number ending in 9461, in order for the undercover officer to contact him to purchase
5 fentanyl again. Weeks later, in May 2022, Nunez settled in the same location on Eddy Street, peddling
6 fentanyl to the addicts languishing in the Tenderloin District. Again, an undercover officer approached
7 Nunez to buy \$100 of fentanyl, which Nunez carefully weighed on a scale in the open street before
8 selling it to the undercover officer. Officers did not arrest Nunez at that time because they knew that a
9 much larger source of drugs was likely located at his house in Oakland.

10 Officers used these two undercover fentanyl purchases to establish probable cause to obtain a
11 series of search warrants. Officers used Nunez’s cell phone number to obtain cellular ping data from his
12 cell phone provider, T-Mobile. Those records showed near daily trips from Nunez’s residence in
13 Oakland to the Tenderloin, where officers saw Nunez steadily pushing fentanyl into the community.
14 Officers specifically saw Nunez travel back and forth from Oakland to the Tenderloin occasionally
15 driving a gray BMW sedan, which was registered to a residence located at 2051 23rd Avenue in
16 Oakland, California. Officers surveilled the residence on multiple days in October and saw Nunez leave
17 the house and travel to the Tenderloin where he dealt drugs all day before returning back to his home in
18 Oakland.

19 **B. Background on Cruz Medina Investigation**

20 Officer Blake Cunningham began an investigation into Cruz Medina in early 2022 upon
21 witnessing Cruz Medina dealing in the Tenderloin. Officers obtained Cruz Medina’s phone number
22 ending in 8701. Officer Cunningham used that phone number to obtain cell site location data for Cruz
23 Medina, which showed regular movement from an unidentified location in Oakland to the Tenderloin.
24 Additionally, Officer Cunningham regularly observed Cruz Medina conducting hand-to-hand drug
25 transactions at night.

26 On October 12, 2022, officers observed Carlos Cruz Medina (aka Marvin Alexander Rodriguez
27 Flores) selling narcotics in the Tenderloin in San Francisco. Officers observed Cruz Medina park a silver
28 Infiniti sedan on Golden Gate Avenue and walk towards the Tenderloin where he sold narcotics to

1 addicts hunched around him, and, like Nunez, traffic narcotics by steadily pushing fentanyl into the
2 community. Officer Blake Cunningham's previous investigation into Cruz Medina confirmed that

3 **C. Execution of the Search Warrant**

4 On October 12, 2022, officers from the San Francisco Police Department obtained a search
5 warrant for Nunez's person, the gray BMW, and his residence. At the time, Nunez had two active bench
6 warrants from Alameda County for failing to appear in two narcotics distribution cases. Nunez also had
7 prior arrests for carrying firearms and daggers, so officers recognized additional surveillance was
8 necessary for officer safety and anticipated that a lethal weapon could be located in the residence.

9 The following day, October 13, 2023, SFPD officers started surveillance at the residence. At
10 around 1:15pm, Gutierrez Nunez left the apartment carrying a black backpack and walked toward his
11 BMW, which was parked in front of the residence. Officers activated their body-worn cameras and
12 converged on Gutierrez Nunez to arrest him. A search of Gutierrez Nunez's backpack revealed a bag
13 containing chunks of fentanyl, a scale, and numerous plastic bags. Officers seized Nunez's BMW key
14 fob which he threw aside when he saw officers coming. Officers used the fob to open the car, which
15 contained documents in Nunez's name as well as a magazine of firearm ammunition.

16 Officers proceeded to the residence where they encountered defendant Cruz Medina, Joshua
17 Melendez, and three women. The apartment had two bedrooms and a joint living room. Melendez was
18 sitting on the couch in the living room. Defendant Cruz Medina was asleep in the first bedroom. Officers
19 immediately recognized Cruz Medina and Melendez from their observations of fentanyl dealing in the
20 Tenderloin.

21 SFPD Officers Cunningham and Zografos searched the first bedroom. Within the first bedroom,
22 officers found fentanyl, methamphetamine, and heroin packaged for distribution and over \$14,000 in
23 cash. Specifically, in a backpack located on a dresser, officers found fentanyl, methamphetamine, and
24 heroin packaged for distribution. In that same dresser, officers found a bail bonds receipt bearing Cruz
25 Medina's name. Officers also recovered narcotics from the closet of bedroom 1 which they mistakenly
26 believed came from a backpack belonging to Joshua Melendez. On further review of the body-worn
27 camera, it was determined that the narcotics did not originate in the backpack. The charges against
28 Joshua Melendez were dismissed.

1 Officers Scafani and Hayes searched the second bedroom. Inside of that bedroom, they found
2 over 5 pounds of fentanyl, over \$7,000 in cash, ammunition, and, ironically, a drug court completion
3 certificate from the San Francisco Community Justice Center issued to Nunez. In addition to clear
4 indicia that Nunez occupied that bedroom, they also found tools of the drug dealing trade such dyes used
5 to color fentanyl, fentanyl pill pressing equipment, drug dealing roster pay-owe sheets, drug cutting
6 agents, and a respirator mask. The officers also found extensive ammunition hidden throughout the
7 residence, including 9 rifle rounds, a high-capacity extended magazine loaded with 24 rounds, and 46
8 additional 9mm rounds of ammunition.

9 Officer Puccinelli searched the front of the residence where he noticed gapping in the fence
10 boards that surrounded the apartment, which was on the ground floor. Officer Puccinelli discovered an
11 AR-15 rifle-style firearm that was a privately manufactured firearm, also known as a ghost gun.
12 Individuals can legally purchase separate pieces of a firearm, to build those pieces into an unregistered,
13 and therefore untraceable, firearm. The ghost gun found at the residence did not have a serial number
14 and was capable of accepting a large capacity magazine. Officers linked the rifle found at the residence
15 and the rifle ammunition found in Nunez's bedroom and obtained a search warrant for Nunez's DNA.
16 Those DNA results showed that Nunez's DNA profile was on the rifle found at his residence. At the
17 scene, Officer Puccinelli secured the rifle and provided it to Officer Cunningham who transported it
18 back to the station.

19 After officers on the scene gathered the narcotics, ammunition, and cash, they placed them in
20 separate bags attributable to each defendant for transport. The lead officer, Alexis Gomez, provided the
21 evidence to Officer Christina Hayes. Officer Hayes transported the evidence from the residence to the
22 San Francisco Police Department where Officer Hayes used a TruNarc analyzer to test the drugs. Officer
23 Gomez was present during the testing of the drugs. The results of the search warrant and presumptive
24 testing of the drugs were produced in a report authored by Officer Gomez, and additionally documented
25 in separate supplemental reports authored by Officers Cunningham, Hayes, and Puccinelli.

26 At trial, the government intends to call the SFPD officers described above who were percipient
27 witnesses of the defendant's drug trafficking activities and participants in the search. For the reasons
28 described below, the government does not intend to call Officer Hayes as a witness. Absent other

1 stipulations, the government also intends to call expert witnesses who performed lab testing of the
2 narcotics seized, the criminalist who determined that Nunez's DNA is on the firearm, and a DEA agent
3 who will provide opinion testimony on drug trafficking and particularly the field of fentanyl and
4 methamphetamine distribution in the Bay Area and indicia of intent to distribute and sell those drugs.

5 The United States requests rulings on the motions as outlined below.

6 **ARGUMENT**

7 **Motion in Limine No. 1: The Drugs Recovered from the Residence Are Admissible**

8 Evidence is generally admissible if it is authentic, relevant, and not unduly prejudicial within the
9 trial court's discretion. Fed.R.Evid. 104, 401, 403. The authentication of evidence is "satisfied by
10 evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* at
11 901(a). When introducing evidence during trial, the government bears the burden of presenting
12 "sufficient proof so that a reasonable juror could find that the evidence was in substantially the same
13 condition as when it was seized." *United States v. Harrington*, 923 F.2d 1371, 1374 (9th Cir.1991);
14 *United States v. Avalos-Gonzales*, 156 F.3d 1239 (9th Cir. 1998). Any defects in the chain of custody go
15 "to the weight, not the admissibility, of the evidence." *United States v. Matta-Ballesteros*, 71 F.3d 754,
16 769 (9th Cir.1995). A lapse in custodial documentation when presented to a jury, does not render the
17 evidence inadmissible so long as there is a "reasonable probability the evidence has not been changed in
18 important respects." *United States v. Diaz-Villasenor*, 68 F. App'x 791, 792 (9th Cir. 2003) (citing
19 *Harrington*, 923 at 1374). Additionally, the government is not required to call the custodian of the
20 evidence. *See Gallego v. United States*, 276 F.2d 914, 917 (9th Cir.1960) (prosecution is not required to
21 produce all persons who had possession of evidence).

22 "In the absence of any evidence of tampering, a presumption exists that public officers properly
23 discharge their official duties." *Harrington*, 923 F.2d at 1374 (internal citations and quotations omitted).
24 "Merely raising the possibility of tampering is not sufficient to render evidence inadmissible." *Id.* A
25 lapse in custodial documentation, even assuming one occurred here, does not render evidence
26 inadmissible. *Id.* For example, in *United States v. Solorio*, the Ninth Circuit held the drug evidence was
27 sufficient to sustain a conviction for distribution of a controlled substance, despite a possible "gap in the
28 chain of custody for the bag carrying the drugs." 669 F.3d 943, 954–56 (9th Cir. 2012).

1 Here, the chain of custody evidence will show that the drugs that were seized, transferred, and
2 sealed in conformance with SFPD protocol were the same drugs seized at the time of the defendants'
3 arrest. Any contention of a possible break in the chain of custody goes to the weight of the evidence, not
4 admissibility. *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995). Officers
5 Cunningham and Zografos participated in the search of Cruz Medina's bedroom and can testify to the
6 condition of the drugs recovered from bedroom 1. Their body-worn camera videos show the condition
7 of the drugs during execution of the search warrant. Likewise, Officer Scafani participated in the search
8 of bedroom 2 and can testify to the condition of the drugs when recovered, as reflected on his body-
9 worn camera. After the transport of the evidence from the residence to the police station, Officer Gomez
10 was present during the testing of the drugs and can testify to the identification of the drugs being in the
11 same condition as when she seized them at the defendants' residence. In addition, the results of the
12 search warrant and presumptive testing of the drugs were produced in a report authored by Officer
13 Gomez, and additionally documented in separate supplemental reports authored by three other officers.
14 Any alleged lapse in the chain is only in the mere transport of the drugs from the residence to the SFPD
15 station. There is no requirement to call everyone who touches an object like the transport officers.
16 *Gallego*, 276 F.2d at 917. Regardless, the chain of custody of the sealed drugs bears on the weight of
17 the evidence not its admissibility.

18 Additionally, admission of the drugs also does not violate the Defendants' confrontation clause
19 rights. The Confrontation Clause of the Sixth Amendment guarantees that "[i]n all criminal
20 prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In
21 *Crawford v. Washington*, the Supreme Court held that this "bedrock procedural guarantee" prohibits the
22 admission of "testimonial statements of a witness who [does] not appear at trial unless [the witness is]
23 unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination." 541 U.S.
24 at 42, 53–54 (2004). The Court provided various examples of testimonial evidence, including materials
25 such as "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-
26 examine" and other documentary evidence prepared by individuals for trial. *Id.* In *Melendez-Diaz v.*
27 *Massachusetts*, the Supreme Court held that forensic drug test reports identifying a specific substance
28 were testimonial statements under *Crawford*, requiring the drug analysts who completed the report to be

1 subject to confrontation. 557 U.S. 305 (2009). The Court reasoned that the test reports were functionally
2 affidavits provided by the drug analyst, wherein the individual swore that the drug test results were
3 accurate and they were “made under circumstances which would lead an objective witness reasonably to
4 believe that the statement would be available for use at a later trial,” *Id.* (quoting *Crawford*, 541 U.S. at
5 52).

6 Here, the government seeks only a pre-trial ruling on the admissibility of the narcotics recovered
7 from execution of the search warrant on October 13, 2022. A separate live witness will testify that the
8 substances recovered are fentanyl and methamphetamine. The narcotics recovered from the house are
9 not testimonial in nature. Therefore, there is no confrontation issue for admitting the fentanyl and
10 methamphetamine recovered from the Defendants in this case. Should the Court have concerns, the
11 government would welcome an evidentiary hearing on this in advance of trial.

12 **Motion in Limine No. 2: Any Examination of Officer Christina Hayes Must be Limited to**
13 **Relevant Evidence**

14 Officer Christina Hays is currently under internal investigation for misconduct relating to her
15 relationship with a confidential informant. That confidential informant was not involved in this case.
16 The existence of the Hayes investigation was disclosed to defense counsel. The government does not
17 intend to call Officer Christina Hayes as a witness. Should either defendant choose to call Officer Hayes
18 as a witness, that testimony must be limited in scope to relevant evidence that is not unduly prejudicial.
19 This is appropriate because improper questions related to Officer Hayes’ relationship with the
20 confidential informant—not one involved in or related to this case—is outside the scope of Officer
21 Hayes involvement in this case and is highly inflammatory and will serve only to mislead and confuse
22 the jury.

23 Case law in this Circuit holds that unsustained complaints against police officers should not be
24 admitted at all. *See, e.g., United States v. Jones*, 2005 WL 348398, *1-3 (9th Cir. Feb. 14, 2005)
25 (affirming Judge Susan Illston’s decision to preclude cross-examination of officers on unsustained
26 complaints) (unpublished); *Brown v. Gutierrez*, 2006 WL 3065574, at *2-3 (N.D. Cal. Oct. 27, 2006) (in
27 civil case, holding that “[t]estimony about the allegations involved in any investigation are excluded”
28 because there was “no finding . . . that [the officer] lied or made false statements”); *Morris v. Lanpher*,

1 2007 WL 1026324, at *1-2 (W.D. Mo. Mar. 27, 2007) (in civil case, precluding questioning of police
2 officer witnesses regarding unsustained complaints against them under Fed. R. Evid. 402).

3 The government does not ask that the defense be wholly precluded from cross-examining Officer
4 Hayes. The government seeks a pre-trial ruling *only* that the scope of the examination be limited to
5 relevant evidence and Officer Hayes' actual involvement in this case. It would be highly prejudicial,
6 misleading, and confusing to the jury to allow defense counsel to delve into a mini-trial focused on
7 Officer Hayes unsustained conduct. Rather, any examination of Officer Hayes should be limited to her
8 factual involvement involving the individuals and circumstances in the case alone.

9 Under these circumstances, the court should require the defense to proffer what it intends to elicit
10 from Officer Hayes prior to calling her as a witness. And to the extent the defense proffers that it
11 intends to call Officer Hayes only to impeach her, that would be improper and the Court should not
12 allow it. *See, e.g., United States v. Williams*, No. CR-13-00764-WHO (ECF No. 1343 at 4-5) (N.D. Cal.
13 Sep. 28, 2017) (requiring that the use of *Henthorn* material be vetted with Court prior to questioning,
14 outside the presence of the jury, except where the questioning concerns express, sustained finding of
15 untruthfulness, false statement, or false report); *United States v. Farley*, No. CR 15-00092- TEH (ECF
16 No. 62 at 17) (N.D. Cal. Nov. 9, 2015) (order establishing procedure for proffer outside the presence of
17 the jury after government completes direct examination of law enforcement witnesses); *United States v.*
18 *Cerna*, No. CR-08-00730-WHA (ECF No. 3644 at 24) (N.D. Cal. Mar. 3, 2011) (requiring that the use
19 of *Henthorn* material be vetted with court prior to questioning, outside the presence of the jury, except
20 where the questioning concerns express, sustained finding of untruthfulness, false statement, or false
21 report); *United States v. Cerna*, No. CR-08-00730-WHA (ECF No. 5230 at 11- 12) (N.D. Cal. Oct. 12,
22 2011) (same); *see also* Fed. R. Evid. 103(d) ("To the extent practicable, the court must conduct a jury
23 trial so that inadmissible evidence is not suggested to the jury by any means.").

24 **Motion in Limine No. 3: Admit Relevant, Inextricably Intertwined, Evidence of Drug Trafficking**
25 **for the Government's Case in Chief**

26 The government moves this Court for an *in limine* order admitting relevant, inextricably
27 intertwined, and "other acts" evidence regarding evidence of drug trafficking by the defendants.

28 Evidence is relevant so long as it has any tendency to make a fact of consequence to the case

1 more or less probable. Fed. R. Evid. 401(a), (b). The evidence does not need to prove an ultimate issue.
2 *United States v. Boulware*, 384 F.3d 794, 805 (9th Cir. 2004). It does not need to prove an element of a
3 charged offense, but merely has to make a fact that matters to the case’s outcome more or less probable
4 than it would have been without the evidence. *See id.* When making relevance determinations, courts
5 should be mindful of the proponent’s theory of the case. *See Sprint/United Mgmt. Co. v. Mendelsohn*,
6 552 U.S. 379, 388 (2008); *Windham v. Merkle*, 163 F.3d 1092, 1103–04 (9th Cir. 1998).

7 Evidence of “other acts,” meanwhile, is generally governed by Rule 404(b). However, other acts
8 evidence “is not subject to Rule 404(b) analysis if it is ‘inextricably intertwined’ with the charged
9 offense.” *United States v. Beckman*, 298 F.3d 788, 793–94 (9th Cir. 2002) (internal citation omitted); *see*
10 *also United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987). This kind of inextricable link can
11 occur in one of two ways: (1) when “particular acts of the defendant are part of . . . a single criminal
12 transaction,” or when (2) “the ‘other act’ evidence . . . is necessary [] in order to permit the prosecutor to
13 offer a coherent and comprehensible story regarding the commission of the crime.” *Beckman*, 298 F.3d
14 at 794 (citation omitted).

15 Evidence of a crime, wrong, or other act that is not inextricably intertwined with the charged
16 conduct may still be admissible in a criminal case to prove “motive, opportunity, intent, preparation,
17 plan, knowledge, identity, or absence of mistake or accident.” Fed. R. Evid. 404(b)(2). It is well
18 established that Rule 404(b) “is a rule of inclusion—not exclusion.” *United States v. Curtin*, 489 F.3d
19 935, 944 (9th Cir. 2007) (en banc). “Once it has been established that the evidence offered serves one of
20 [the purposes authorized by Rule 404(b)(2)], . . . the only conditions justifying the exclusion of the
21 evidence are those described in Rule 403” *Id.* (internal quotation marks omitted). Thus, “[u]nless
22 the evidence of other acts *only* tends to prove propensity, it is admissible.” *United States v. Castillo*, 181
23 F.3d 1129, 1134 (9th Cir. 1999) (emphasis added); *United States v. Jones*, 982 F.2d 380, 382 (9th Cir.
24 1992) (holding that prior acts are admissible “so long as the acts tended to make the existence of [the
25 defendant’s] knowledge or intent more probable than it would be without the evidence”). Other acts
26 evidence is admissible under Rule 404(b) if it: (1) tends to prove a material point in issue; (2) is not too
27 remote in time; (3) is proven with evidence sufficient to show that the act was committed; and (4) if
28 admitted to prove intent, is similar to the offense charged.” *Beckman*, 298 F.3d at 794 (citations

1 omitted); *accord United States v. Ramirez-Robles*, 386 F.3d 1234, 1242 (9th Cir. 2004) (citations
2 omitted).

3 Here, the government's presentation of the facts relating to the charged conduct *requires* the
4 admission of evidence concerning the observed drug trafficking activities of both defendants.
5 Specifically, Nunez sold fentanyl to an undercover officer in April and May of 2022. During the first
6 sale, Nunez provided a phone number which led to cell site evidence that revealed the location of his
7 residence. Officer Alexis Gomez obtained a search warrant for that residence by specifically relying on
8 the two prior fentanyl purchases and the cell site location data. As recently as the day before the
9 execution of the search warrant, both Nunez and Cruz Medina were seen by SFPD officers dealing
10 fentanyl in the Tenderloin which formed the basis for officers' actions at the scene of the search warrant.
11 The evidence of drug trafficking from both defendants leading up to the execution of the search warrant
12 should be admitted because it is a substantive part of and inextricably intertwined with the charged
13 offenses. The only way for the government to tell the jury a coherent and comprehensible story
14 regarding the commission of the crime is by starting with the officers' observations of the defendants in
15 the Tenderloin and accessing the residence and vehicles involved in this investigation. As a result, Rule
16 404(b) is simply not implicated. *Beckman*, 298 F.3d at 793-94.

19 Even if the Court views the defendants' actions leading up to the search warrant execution
20 through the lens of Rule 404(b), the instances in which officers observed both defendants selling drugs
21 in the Tenderloin are highly probative of their intent with respect to the drugs recovered from Nunez's
22 backpack and in the residence.

23 **Motion in Limine No. 4: Admit Relevant, Inextricably Intertwined, and Evidence of the Firearm**
24 **for the Government's Case in Chief**

25 The government moves this Court for an *in limine* order admitting relevant, inextricably
26 intertwined, and "other acts" evidence regarding the presence of ghost gun at the defendants' residence.
27

28 Here, officers found a firearm that did not have a serial number (ghost gun) stuffed into a trash

1 bag between the slats of the fence at the residence. Officers also found drugs and drug paraphernalia, in
2 other words, evidence of drug trafficking, at the house. Officers swabbed the firearm and submitted the
3 swab for DNA testing. The DNA report showed “very strong support” that the DNA on the firearm was
4 a match to Nunez. The firearm should be admitted as inextricably intertwined evidence of drug
5 trafficking. The nexus between the firearm and alleged drug trafficking is clear. *See United States v.*
6 *Mosley*, 465 F.3d 412, 417 (9th Cir. 2006) (explaining that the Government must prove a nexus between
7 the firearm and the illegal drug trafficking). The firearm was found at the locus of the drug trafficking
8 stash house - the residence where both defendants live. Drugs, drug trafficking paraphernalia, and
9 dozens of rounds of ammunition were found at the residence. The location of the firearm at the front of
10 the house makes it clear that it could be used to protect pounds of fentanyl concealed within the
11 residence. The ammunition found in Nunez’s BMW also illustrates that the firearm was kept for
12 protection because he planned to transport the ammunition with the drugs he was arrested carrying,
13 which as his near daily pattern suggest, was to the Tenderloin to deal fentanyl.
14

15 The government is also noticing that its expert witness on drug trafficking, DEA Special Agent
16 David Mateer, will testify about the presence of firearms as tools of the trade for drug traffickers.
17 Through Special Agent Mateer’s testimony, the jury can properly infer that the presence of a firearm and
18 ammunition associated with Nunez and the car he used to drive to the Tenderloin is additional evidence
19 of his intent to distribute the drugs found in his possession.
20

21 **Motion in Limine No. 5: The Defense Should Be Barred from Offering Evidence that Could Have**
Been, but Was Not, Produced in Discovery

22 The Court should preclude the defense from introducing evidence that it should have produced,
23 but did not produce, under the reciprocal discovery obligations of Federal Rule of Criminal Procedure
24 16(b), and pursuant to Federal Rule of Criminal Procedure 26.2 (reverse Jencks).
25

26 **Reciprocal Disclosure Under Rule 16(b)**

27 The reciprocal discovery requirements of Rule 16(b) require the Defendant to produce certain
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1 evidence that he intends to use in his case-in-chief at trial, including documents, data, photographs, and
2 other tangible objects; “results or reports of any physical or mental examination and of any scientific test
3 or experiment”; and “a written summary of any [expert witness] testimony that [he] intends to use under
4 Rules 702, 703, or 705 of the Federal Rules of Evidence.” Fed. R. Crim. P. 16(b)(1). To date, the
5 Defendant provided one page of discovery. The government therefore seeks an order precluding the
6 Defendant from introducing at trial any evidence that should have been, but was not, produced under the
7 reciprocal discovery obligations of Rule 16(b). *See* Fed. R. Crim. P. 16(d)(2)(C) (authorizing such an
8 order).

9 **Reciprocal Disclosure Under Rule 26.2**

10 Federal Rule of Criminal Procedure 26.2(a) provides:

11 After a witness other than the defendant has testified on direct
12 examination, the court, on motion of a party who did not call the witness,
13 must order an attorney for the government or the defendant and the
14 defendant’s attorney to produce, for the examination and use of the
moving party, any statement of the witness that is in their possession and
that relates to the subject matter of the witness’s testimony.

15 The statute embodying the rule was enacted, among other reasons, to “place in the criminal rules the
16 substance of . . . 18 U.S.C. § 3500 (the Jencks Act).” Fed. R. Crim. P. 26.2 Advisory Committee Notes.
17 Pursuant to Rule 26.2(a), neither the government nor a defendant is required to produce witness
18 statements until after the witness’s testimony on direct examination. The government intends to produce
19 any witness statements before trial. Because of the reciprocal nature of Rule 26.2, and in the interest of
20 expediting trial proceedings, the defense should be required to make a pretrial production of the
21 statements of any witness it intends to present. If the defense declines to produce such witness
22 statements until after direct examination, the trial will be delayed unnecessarily because the government
23 will need time to review those statements prior to cross-examination.

24 **Motion in Limine No. 6: All Witnesses Except the Case Agent and the Defendants Should Be
Excluded from the Courtroom**

25 Under Federal Rule of Evidence 615, “[a]t a party’s request, the court *must* order witnesses
26 excluded so that they cannot hear other witnesses’ testimony.” Fed. R. Evid. 615 (emphasis added).
27 However, “a person whose presence a party shows to be essential to presenting the party’s claim or
28

1 defense" should not be excluded from the courtroom during trial. *Id.* Case agent Alexis Gomez been
2 critical in investigating this case and is an integral parts of the government's trial team. All other
3 witnesses (excepting the defendants, should they elect to testify) should be excluded under Rule 615.

4 **Motion in Limine No. 7: The Defense Should Not Be Allowed to Reference Punishment or**
5 **Conviction Consequences in Front of the Jury, or Attempt to Elicit Jury Sympathy or**
Nullification.

6 The government moves to preclude as irrelevant and unduly prejudicial any reference by the
7 defense to the defendants' potential sentence or punishment, potential collateral consequences of
8 conviction, or the fact that this case has been ongoing for an extended period during all phases of the
9 trial, including jury selection, opening statements, examination of witnesses (including the defendants, if
10 either elects to testify), and summation.

11 "It has long been the law that it is inappropriate for a jury to consider or be informed of the
12 consequences of their verdict." *United States v. Frank*, 956 F.2d 872, 879 (9th Cir. 1991). This is so
13 because informing the jury about potential sentences or "other matters relating to [the] disposition of the
14 defendant" tends to "draw the attention of the jury away from their chief function as sole judges of the
15 facts, open the door to compromise verdicts and to confuse the issue or issues to be decided." *Id.*
16 (quoting *Pope v. United States*, 298 F.2d 507, 508 (1962)) (italics omitted). Indeed, the Supreme Court
17 has determined that "providing jurors sentencing information invites them to ponder matters that are not
18 within their province, distracts them from their factfinding responsibilities, and creates a strong
19 possibility of confusion." *Shannon v. United States*, 512 U.S. 573, 579 (1994). Information bearing on
20 punishment is simply "irrelevant to the jury's task." *Id.* This principle is reflected in the Ninth Circuit
21 Model Criminal Jury Instructions: "The punishment provided by law for this crime is for the court to
22 decide. You may not consider punishment in deciding whether the government has proved its case
23 against the defendant beyond a reasonable doubt." Model Crim. Jury Instr. 6.22 (2022 ed.); *see also*
24 *United States v. Lynch*, 903 F.3d 1061, 1081 (9th Cir. 2018) (rejecting challenge to this jury instruction).

25 The defense should thus be precluded from making any reference to prospective punishment or
26 any other fallout in any phase of the trial. References to penalties and potential collateral consequences
27 could be as overt as "this case has serious consequences for the defendant," "the defendant's liberty is at
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1 stake in this trial,” “the defendant will never be able to get a job with a criminal record,” or “the
2 defendant has already spent enough time in jail.” The Court cannot “un-ring the bell” once the jury hears
3 any reference to the consequences of a conviction and the damage cannot be neutralized by a curative
4 instruction.

5 For similar reasons, testimony or evidence relating to the defendants’ personal circumstances,
6 financial straits or obligations, stress, health, or references to the effect of the investigation or conviction
7 upon them or any other person are irrelevant to the charges and should be precluded. This kind of
8 information amounts to an appeal to juror sympathy that would distract jurors from their fact-finding
9 duties.

10 The Ninth Circuit Model Criminal Jury Instructions require jurors to “not . . . be influenced by
11 personal likes or dislikes” or by “sympathy.” Model Crim. Jury Instr. 6.1 (2022 ed.). Courts regularly
12 preclude criminal defendants from seeking to elicit jurors’ sympathy because the means by which
13 defendants do so often are irrelevant to the elements of the charged offenses. *See, e.g., United States v.*
14 *Mendoza*, No. 16-CR-0150-BLF, 2021 WL 1238314, at *3 (N.D. Cal. Apr. 2, 2021) (granting
15 government’s motion *in limine* to preclude defense attempts to elicit jury sympathy); *United States v.*
16 *Gomez*, 772 F. Supp. 2d 1185, 1197 (C.D. Cal. 2011) (granting government’s motion to preclude
17 improper defendant hearsay statements and references to punishment and sympathy). The Court should
18 bar the defense from referring to the defendants’ personal circumstances or topics designed to elicit
19 jurors’ sympathy if such topics do not bear on the defendants’ guilt or innocence of the charged
20 offenses.

21 Finally, the defense should be precluded from pursuing jury nullification. Neither a defendant
22 nor his attorney has a right to present evidence or argument that is irrelevant to an element of, or a legal
23 defense to, the crime charged; verdicts must be based on the law and evidence, not on jury nullification.
24 *See Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005) (affirming district court’s dismissal for
25 cause of a juror who expressed belief in exercising power of jury nullification and noting that “while
26 jurors have the power to nullify a verdict, they have no right to do so”); *United States v. Powell*, 955
27 F.2d 1206, 1213 (9th Cir. 1991) (affirming district court’s refusal to instruct the jury that it can nullify).

28 The Court should preclude the defense from suggesting that the jury should not convict the

1 defendants because, for example, they have limited criminal history, were suffering from addiction, have
2 families to take care of, or “have already suffered enough.” Nor should the defense be permitted to argue
3 or suggest that the government should have used its resources in other ways, including by minimizing
4 the seriousness of the multiple felony charges, questioning whether the government should have charged
5 the defendants in the first place, suggesting that the losses or magnitude of the harm caused were not
6 serious or significant enough to merit a federal prosecution, or characterizing the case as not worth the
7 jury’s time (e.g., “this petty case”). Whether such comments evoke concepts of punishment, urge jury
8 nullification, or both, they are improper under the law. They would present irrelevant and plainly
9 prejudicial facts and argument to the jury, and would cause the jury to focus, impermissibly, on the
10 potential legal consequences of the alleged crimes rather than the factual question of the defendants’
11 guilt or innocence. The Court should not permit the defense to pursue such a strategy, whether in
12 statements to the jury or in questioning witnesses.

13 **CONCLUSION**

14 For the foregoing reasons, the government respectfully requests that the Court grant its motions
15 *in limine*. The government also respectfully reserves the right to supplement these motions *in limine* if
16 additional issues arise that require the Court’s intervention.

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18 DATED: July 20, 2023
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Respectfully submitted,
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United States Attorney

/s/
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above motion was served on July 20, 2023, on all parties of record using CM/ECF.

Sincerely,

/s/
HILLARY T. IRVIN
Assistant United States Attorney